Petition

81-668

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH C. HOFGESANG SAND CO., INC. - - PETITIONER

versus

LOUISVILLE & JEFFERSON COUNTY BOARD - - RESPONDENT
OF ZONING ADJUSTMENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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FOR PETITIONER

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QUESTIONS PRESENTED

1. Is it a violation of the Equal Protection Clause of the Fourteenth Amendment for the Board to forfeit Petitioner's bond for minor board regulation violations which are being continuously violated by all other permit holders and not forfeit the bond of any other permit holder?

2. Is it a violation of the due process clause of the Fourteenth Amendment to permit the Board to forfeit a bond at will upon any minor zoning regulation violation without right to judicial review of intention of the parties as to nature or purpose of the bond or as to any elements of the breach or of damage?

3. Is it a violation of the Fifth Admendment and Fourteenth Amendment for the two county government departments to combine efforts and take Petitioner's property without just compensation?

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

JOS. C. HOFGESANG SAND CO., INC. PETITIONER

V.

LOUISVILLE & JEFFERSON COUNTY BOARD OF ZONING ADJUSTMENT RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Joseph C. Hofgesang Sand Company, Inc., respectfully prays that a Writ of Certiorari issue to review the Opinion of the Supreme Court of Kentucky entered in this proceeding on May 26, 1981.

OPINION BELOW

The opinion of the Supreme Court of Kentucky rendered May 26, 1981, was reported as Louisville, etc. vs. Joseph C. Hofgesang, Sand Co., Inc., Ky., 617 S.W. 2nd 40. (Appendix H, p. 36.)

The order of the Supreme Court of Kentucky denying Petitioner's Petition for Rehearing was entered on July 7, 1981. (Appendix I, P.44.) The opinion of the Court of Appeals of Kentucky rendered March 23, 1979 is marked "to be published" but Petitioner is unable to find any official reporting thereof. (Appendix F, P. 19) The opinion and order of the Supreme Court of Kentucky entered September 18, 1979 is reported as Louisville & Jefferson City v. Joseph C. Hofgesang, Ky., 586 S.W. 2nd 718. (Appendix A, P.1.) The opinion of the Court of Appeals of Kentucky rendered on June 13, 1980 was not reported (Appendix G, P.30) The judgment of the Jefferson Circuit Court entered October 24, 1977. (Appendix B, P.)

JURISDICTION

The opinion of the Supreme Court of Kentucky reversing the decision of the Court of Appeals of Kentucky and affirming the summary judgment granted by the

Jefferson Circuit Court was entered on May 26, 1981 and a timely Petition for Rehearing was denied by order of the Supreme Court of Kentucky on July 7, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Zoning District Regulations for the City of Louisville and Jefferson County, Section 30, Conditional Uses, the provisions whereof are lengthy therein pertinent text is set forth as Appendix J, P. 45 .

STATEMENT OF THE CASE

Petitioner, Joseph C. Hofgesang Sand Company, Inc. was granted a conditional use permit by Jefferson County, Ky. in 1967 acting in its capacity as Respondent, Louisville and Jefferson County Board of Zoning Adjustment (Hereafter called "Board"), to perate a borrow pit and sanitary landfill on 60 acres of Petitioner's 75 acre tract of land in Jefferson County, Ky. Jefferson County Kentucky., through its department of public works, (hereinafter called "works")

filed this action as Plaintiff in December 1973 to take a large portion of Petitioner's tract in an area surrounding and including part of Petitioner's borrow pit and landfill working area for construction of a flood wall. February 1974 works took right to possession of the condemnation areas. March 1974 works obtained an order from trial court prohibiting Petitioner from any further activity in the condemnation areas. April 1974 board assisted by Works began proceedings against Petitioner for termination of Petitioner's permit based upon allegations of Board regulations violations committed from April 15, 1974 to May 22, 1974 mostly in the areas already taken by Works. Board prosecuted and heard the "trial" for termination of Petitioners permit determining numerous violations of

its regulations and terminated Petitioners permit and directed that action be taken to forfeit petitioners $120,000.00 bond. Petitioner appealed Boards permit termination decision to Jefferson Circuit Court which denied all Petitioners efforts to obtain discovery and submit proof and affirmed Board's decision terminating Petitioners permit.

Thereafter, Works amended its pleadings to add Board as a party to this condemnation action and Board entered the action demanding forfeiture of the full $120,000.00 amount of the bond and enforcement of the mortgage given by Petitioner against it's 75 acre tract of land as security for the bond. Trial court granted summary judgement for the $120,000.00 face amount of the bond and for sale of the remainder of Petitioners

75 acres left after the condemnation taking by Works. Works asked the trial court to exclude Petitioner's loss based upon its borrow pit and sanitary landfill business from compensation damages to be paid to Petitioner for its condemnation taking based upon Boards' action terminating the permit.

The Ky. Court of Appeals correctly stated

> "In the case before us no statute fixed the amount of the bond or required recovery of its full amount upon breach of any of its conditions. In fact the amount of the bond was arrived at through negotiation between the parties. The zoning regulations require a bond of $2,500.00 per acre, secured by a deposit of cash, a certified check, or corporate surety. The bond given by the appellant was for $2,000.00 per acre and was secured by a mortgage on the land itself. Neither the bond nor the mortgage given to secure it provide that the amount of the bond is to be forfeited as liquidated damages upon breach. There is nothing

> in the zoning regulations making such a requirement. There is no evidence in the record from which we can determine if the actual damage caused by the breach is proportionate to the amount of the bond, particularly if, as contended by the appellant, the sole purpose of the bond was to insure only that actual digging itself and refilling were completed in accordance with the ordinance." (opinion rendered June 13, 1980- Appendix G)

The bond was at the rate of $2,000.00 per acre for the 60 acres permitted. In Petitioners answer to the Boards cross claim - it stated that of the 60 acres for which the bond was given at $2,000.00 per acre.

(a) a large portion was neither excavated or filled.

(b) A large portion was completed in excavation and fill before the dates regarding alleged violations.

(c) A large portion of the area that had been excavated and not refilled had been taken by Works before the dates regarding alleged violations.

(d) A small portion (approximately 6 acres) was excavated and not completely refilled and not taken from Petitioner when violations were held to exist.

In Petitioners same pleading in the trial court Petitioner alleged that Works and Board are both Jefferson County, Ky; that together and separately they made completion of performance of bond requirements impossible and that their joint actions amounted to a taking without just compensation. Petitioner's same pleading contained a cross claim against Board for a forced taking of the remainder of the

75 acre tract without just compensation.

Petitioner's Response to Boards motion for summary judgment in the trial court raised denial of due process of law stating that under no circumstances could Petitioner properly be denied its right to litigate the issues of material fact regarding the nature and purpose of the bond and mortgage and the elements of breach and damage relating thereto and further argued that the actions of Jefferson County, Ky. as Board in proceeding to revoke Petitioners permit and enforce its bond while as Works taking possession of the property in question in the permit working area and even condemning a large portion of Petitioners landfill working area for its own use as a landfill resulted in impossibility of performance of the bond requirements

caused by Jefferson County, Ky.

The trial court sustained Boards motion for summary judgement against Petitioner for the full $120,000.00 bond and for judicial sale of the remainder of Petitioner's 75 acre tract.

Petioner filed a motion to set aside the trial court's order substaining, Board's motion for summary judgment repeating statements regarding bond being at $2,000.00 per acre and bond performance involving only a small portion of the 60 acres bonded; regarding actions of Works and Board causing impossibility of performance of Bond requirements and regarding setoff and further stating that all permit holders regularly violate provisions of the Boards applicable regulations and alleging that the action of the Board in forfeiting Petitioner's bond for violations

which are knowingly and regularly committed by all permit holders while not forfeiting any bond of any other permit holder amounted to discrimination by Board against Petitioner.

Board then filed its objection to Petitioners motion arguing that Works and Board were not the same person persuing the same right in the same capacity.

Petitioner then filed its Objections to the Commissioner's Report stating that the Court failed to take or consider any proof for determination of any material issue of fact jointed in the pleadings and record as did the Commissioner and that Petitioner was being deprived of its constitutional right to a due process proceeding as contained in the Constitutions of Ky. and of the United States.

The trial Court thereupon entered the summary Judgment and order of sale and Petitioner filed a timely motion for new trial and to alter, amend or vacate the judgment, repeating that the judgment was a summary judgment denying trial of the actual issues and depriving Petitioner of its right to trial and its constitutional right to due process of law and moving the trial court to grant Petitioner its constitutional right to trial and due process of law thus was denied it. The trial court overruled Petitioners motion.

In Petitioner's Brief for Appellant to the Ky. Court of Appeals it argued that it had been completely denied its right to trial of issues regarding the nature and purpose of the bond and mortgage and the elements of breach and damage pertaining to the bond; impossibility of performance

caused by actions of Board and Works; discrimination in enforcement of bond forfeiture against Petitioner while knowingly permitting continual regulation violations by all other permit holders without bond forfeiture and enforcement of bond forfeiture for 60 acres where violations could only pertain to a small percentage thereof.

Board in its Brief for Appellee to the Ky. Court of Appeals - argued as to the issue of discrimination that Petitioner did not allege sufficient grounds for a violation of the equal protection clause of the 14th Amendment to the United States Constitution and that there is no evidence of such discrimination.

The Board filed a supplemental brief for appellee to the Kentucky Court of Appeals in which it pointed out the

concern of the Court of Appeals in oral argument that the holding of the trial court could result in an arbitrary forfeiture of large penal bonds based upon a minor infraction with a denial of any opportunity for judicial review of the bond forfeiture action by the Board. The Court of Appeals of Kentucky in its opinion rendered March 23, 1979, held that Petitioner's defenses of impossibility of performance and discrimination were barred by a prior judgment adjudicating termination of the permit. The court then held that many issues of material fact are yet to be determined regarding bond forfeiture. The Kentucky Court of Appeals also held that Petitioner's argument that Board and Works are the same party could not be raised on appeal because it had not been raised at the trial court. Such issue had been raised at trial court as hereinabove shown. The Kentucky Court of Appeals held

in its opinion rendered June 13, 1980, that since no statute set the amount of the bond or required recovery in full on breach of any of its conditions and since there was no liquidated damage forfeiture of the bond or in the zoning regulation requirements by the Board and no evidence in the record regarding actual damage from breach, the action was remanded to the trial court for trial of all factual issues involved.

The opinion of the Kentucky Supreme Court entered May 26, 1981, cited United States v. Zerby, 271 U.S. 332 (1926), which is the leading United States Supreme Court case on bond forfeitures which supports the contentions of Petitioner and the judgment of the Kentucky Court of Appeals and by misapplication of the holding of the Zerby case held the exact opposite reversing the Court of Appeals decision and affirming the trial court's decision automatically forfeiting the entire $120,000 bond with-

out determination of any fact other than the violation of any one or more of the many Board regulations for permit operation.

Petitioner filed its Petition for Rehearing to the Kentucky Supreme Court showing clearly its misapplication of the Zerby case and stating that the decision of the Kentucky Supreme Court adjudicated the forced taking of property from Petitioner without just compensation by the Board. The Kentucky Supreme Court denied the Petition for Rehearing.

ARGUMENT

The Board has never even attempted to forfeit the bond posted by any other permit holder. Petitioner alleged and offered to prove that literally every permit holder of a sanitary landfill permit is regularly in known violation of one or more of the Board's regulations which are the subject of the conditions of the bond

and that the Board's action in forfeiting Petitioner's bond was taken in a completely arbitrary and descriminatory manner and to accomplish illegal and improper purposes for the Board and against Petitioner.

Clearly such proof would show a violation of Petitioners rights under the equal protection clause of the Fourteenth Amendment.

The Court denied Petitioner that right on the ground that Petitioner was barred by a prior determination in a proceeding to terminate Petitioner's land-fill permit. The discriminatory action by the Board for forfeiture of the bond and enforcement of the mortgage is a completely independent act which the Board may or may not choose to take after terminating a permit. Its failure and refusal to take this act against any other permit holder when all are in continuous violation coupled with its action against Petitioner alone for the same violations is a Fourteenth Amendment

violation of Petitioner's right to equal protection under the law.

The courts have held in this action that the Board has the power to forfeit Petitioner's full bond for any minor violation of its numerous regulations no matter how slight and Petitioner cannot obtain judicial review of that forfeiture. The case of U.S. v. Zerby has been cited as support for that holding. The Zerby case holds the exact opposite in a factual situation which is on al fours with the present case. The present decision has the effect of complete denial of judicial review of an arbitrary and discrimination act by the Board against Petitioner which can be taken at any time against any permit holder at the whim of the Board. It also allows the same Board to take similar extremely damaging and confiscatory action against anyone it chooses at any time it chooses completely free from any judicial review and completely independent of any

statutory restrictions.

It can set any bond provisions it desires and enforce them any way it wishes without any judicial review.

Petitioner clearly alleged and sought the right to prove throughout these proceedings that Jefferson County, Kentucky acting in its two capacities as the original condemnation plaintiff and as the bond - forfeiting and mortgage-foreclosing Respondent, Board combined efforts to take property from Petitioner without just compensation. Petitioner was denied the right to be heard which denial constitutes a violation of the Fifth Amendment and Fourteenth Amendment provisions against taking property without just compensation.

CONCLUSION

This action involves a completely erroneous application of the Zerby case which is leading authority by the United

States Supreme Court for the exact opposite of the holding which cites it as authority. Although it purports to follow the exceptions to the Zerby case applied to actions in which the amount of a bond and the single act which results in complete forfeiture is set by legislative enactment none of these distinguishing facts are present. No statute set the amount of the bond or the amount to be paid on any designated breach.

The affect of the holding is to allow the Board to set whatever bond provisions it chooses and to work devastating forfeitures at will without check or review by any judicial proceeding.

Such a holding clearly violates many of the federal constitutional safeguards and should not be tolerated.

Respectfully submitted,

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Appendix

81-668

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NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH C. HOFGESANG SAND CO., INC. - - PETITIONER

versus

LOUISVILLE & JEFFERSON COUNTY BOARD - - RESPONDENT
OF ZONING ADJUSTMENT

APPENDIX

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APPENDIX A

ENTERED September 18, 1979.

SUPREME COURT OF KENTUCKY
79-SC-195-D

LOUISVILLE & JEFFERSON COUNTY BOARD OF ZONING ADJUSTMENT — MOVANT

V. ON REVIEW FROM COURT OF APPEALS
No. 78-CA-851-MR
(Jefferson Circuit Court 180516)

JOSEPH C. HOFGESANG SAND COMPANY, INC. — RESPONDENT

OPINION AND ORDER

The motion of Louisville & Jefferson County Board of Zoning Adjustment for a review of the Decision of the Court of Appeals is granted.

The decision of the Court of Appeals rendered March 23, 1979, is now vacated, and this proceeding is remanded to the Court of Appeals for reconsideration in light of City of Paducah v. Jones, 126 Ky. 809, 104 S.W. 971 (1907), and American Book Company v. Wells, 26 K.L.R. 1159, 83 S.W. 622 (1904).

All concur.

ENTERED September 18, 1979.

(s) John S. Palmore
Chief Justice

ATTORNEY FOR MOVANT:
Alex F. Talbott
900 Fiscal Court Building
Louisville, Kentucky 40202

ATTORNEY FOR RESPONDENT:
Ben B. Hardy
Suite 400, Fireside Bldg.
Louisville, Kentucky 40202

APPENDIX B

ENTERED AUGUST 10, 1977

No. 180516 JEFFERSON CIRCUIT COURT

DIVISION SEVEN

JEFFERSON COUNTY, KENTUCKY PLAINTIFF

vs. MOTION FOR SUMMARY JUDGMENT

JOSEPH C. HOFGESANG SAND CO., INC. DEFENDANT

and

LOUISVILLE AND JEFFERSON COUNTY BOARD OF ZONING ADJUSTMENT DEFENDANT-CROSSCLAIMANT

* * * * * * * * *

MOTION

Comes the Defendant-Crossclaimant, Louisville and Jefferson County Board of Zoning Adjustment, moves the Court to enter the Summary Judgment set out below, it appearing that there are no material facts in actual or good faith controversy and that said Defendant-Crossclaimant, is entitled to said judgment as a matter of law. The basis for this motion is the entire record in this action including specifically the following: Copies of the bond and mortgage (Exhibit A & B) attached to the answer, counterclaim and crossclaim; the certified copy of Section 30 Zoning District Regulations for Jefferson County, (Exhibit 1) attached to the motion for summary judgment; and the attested copies of the Circuit Court judgment, the Board's findings of facts and conclusion of law and the Court Order which have been entered prior to this action. (Exhibit 2,3 & 4)

CERTIFICATE

I certify that a copy hereof was mailed to the person and address set out below on this 27th day of June, 1977.

Mr. Ben Hardy
400 Fireside Building
209 S. 5th Street
Louisville, Kentucky 40202

Mr. Charles I. Sandman
100 N. 6th Street
Louisville, Kentucky 40202

(s) Alex F. Talbott
900 Fiscal Court Building
Louisville, Kentucky 40202
(502) 581-6230

Motion for Summary Judgment sustained, action referred to Commissioner to check tendered judgment.

(s) Judge Ballantine

JUDGMENT

Upon motion of the defendant-crossclaimant, Louisville and Jefferson County Board of Zoning Adjustment, and there appearing to be no actual controversy as to any material facts,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The defendant-crossclaimant, Louisville and Jefferson County Board of Zoning Adjustment shall recover from the defendant, Joseph C. Hofgesang Sand Co., Inc. the amount of $120,000.00 plus interest at the rate of 6% per annum from May 22, 1974 until the date of this judgment and thereafter at a rate of 8% until paid and its costs expended therein.

2. In order to secure the said Board the amount adjudged above, it is further adjudged to have a first mortgage lien on the property hereinafter described which shall be enforced against said property by judicial sale.

The lien in favor of said Board is prior and superior to all liens ;claims and encumbrances against the property except the ad valorem taxes immediately hereinafter set out and the property shall be sold by the Commissioner subject to the following:

a. State, County and School taxes for the year 1977 and all taxes due thereafter.

b. Easements, restrictions and stipulations of record including but not limited to those claimed in this action by the plaintiff, Jefferson County, Kentucky.

c. Assessments for public improvements levied against the property, if any.

d. Any facts which an accurate survey and inspection of the property may disclose.

e. All laws and regulations affecting the use of said property.

3. The first mortgage lien of the said Board applies to the following described property:

> BEGINNING at a stone corner to Rudolph Allsmiller's 70 acres and in a line of Bernhardine Allsmiller's land of 96 acres; thence with a line of said 96 acres and William Allsmiller, Jr.'s 96 acres South 28 degrees 55 minutes West, passing a stone corner to said two 96 acre tracts at 10 poles, in all 116-56/100 poles to a stone in the original line of Matthew Garrison's tract, and corner to William Allsmiller, Jr.'s 96 acres; thence with the Garrison line North 63 degrees West passing a stone on bank of the Ohio River at 106-18/100 poles, in all 117-18/100 poles to the corner of the Garrison tract at the low water mark of said river; thence up said river with the original line of the William Allsmiller 347 acres, which runs with low water mark of the said river, North 29 degrees East 44 poles; thence North 31 degrees East 40 poles; thence North 31-1/2 degrees East 33 poles to the corner of Rudolph Allsmiller's 70 acre tract; thence with a line in said tract South 63 degrees East 114 poles to the beginning.
>
> There is excepted from the above described property the tract conveyed by Ernest Schlatter, et.al., to Fiscal

Court of Jefferson County, Kentucky, by deed dated July 14, 1950, and recorded in Deed Book 2643, page 57, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

BEING the same property conveyed to Gernert Court, Inc., by deed dated July 1, 1965, recorded in Deed Book 3974, page 253, in the office aforesaid. The name of the corporation, Gernert Court, Inc., was changed to Jos. C. Hofgesang Sand Co., Inc. by amended articles of incorporation in Frankfort December 29, 1965, and recorded in Jefferson County Court Clerk's office in Corporation Book 142, page 28.

4. All of the above described property shall be sold by the Commissioner except that portion being condemned by the plaintiff herein Jefferson County, Kentucky which is more particularly described as follows:

Beginning at a point in the proposed right-of-way line of Jefferson County Floodwall, which point is in the south property line of the Joseph C. Hofgesang Sand Co., Inc. tract as described in Deed Book 3974, Page 253, North 58° 25'32" West, 993.30 feet from the southeast corner of said tract and 117.53 feet left (south) of the Jefferson County Floodwall centerline Station 221+49.58; thence North 58° 25' 32" West along said south property line 491.53 feet, crossing said centerline Station 222+81.80 to a point 300.00 feet right (north) of said centerline Station 223+86.64; thence along an arc 831.17 feet to the right, having a radius of 681.97 feet, the chord of which is said centerline Station 219+21.11; thence

South 60°21'48" East, 510.90 feet to a point 300.00 feet right (north) of said centerline Station 214+00.00; thence North 64°54'26" East, 141.48 feet to a point 300.00 feet right (north) of said centerline Station 208+00.00 ; thence North 36°58'38" East, 456.88 feet to a point in the right-of-way line of the existing Jefferson County Floodwall, 272.98 feet right (north) of said centerline Station 203+43.92; thence South 58°56' 03" East along said right-of-way line 269.76 feet to a point in an east property line of said tract, 3.48 feet right (north) of said centerline Station 203+32.06; thence South 33°47' 07" West along said east property line 767.23 feet crossing said centerline at Station 209+04.02 to a point 75.00 feet left (south) of said centerline Station 210+70.47; thence along an arc 409.78 feet to the right, having a radius of 456.97 feet, the chord of which is North 86°03'10" West, 396.19 feet to a point 75.00 feet left (south) of said centerline Station 214+12.99 ; thence North 60°21'48" West, 508.11 feet to a point 75.00 feet left (south) of said centerline Station 219+21.11; thence along an arc 183.95 feet to the left, having a radius of 306.97 feet, the chord of which is North 77°31'49" West, 181.21 feet to a point 75.00 feet left (south) of said centerline Station 221+50.00; thence South 5°05'35" East, 42.53 feet to the point of beginning.

5. The purchaser at the Commissioner's sale shall take the property subject to the encumbrances

hereinabove set out both free and clear of all other liens and encumbrances and free and clear of the rights and interests of all parties to this action.

6. After crediting all proceeds received as a result of the Commissioners sale the said board shall have a personal judgment against Joseph C. Hofgesang Sand Co., Inc. for the amount of any deficiency from the amount adjudged in paragraph 1 above and such deficiency shall be a first lien against any and all proceeds resulting from the condemnation by the plaintiff herein.

7. The property hereinabove described to be sold at the Commissioner's sale is indivisable and cannot be divided without materially impairing its value, and said property shall be sold as a whole.

8. Any purchaser at the Commissioner's sale, except the said Board, shall be required to make a cash deposit of $1,000.00 at the time of sale.

9. The proceeds of sale or a sufficiency thereof, shall be applied to the following items in this order of priority:

(a) The cost of this action;

(b) The full satisfaction of the amount

adjudged to be due to the said Board as set out in paragraph 1 above.

Any junior liens or claims of other parties herein shall attach to the surplus proceeds of sale, if any, in the priority in which they attach to the real property.

10. In making the sale, the Commissioner of this Court shall follow the directions, and the sale shall be on the terms specified, in Rule 909 of the Rules of Practice of this Court, which is incorporated herein by reference.

11. Pursuant to CR-54.02, it is adjudged that this is a final and appealable judgment and order of sale, and that there is no just reason for delay in its entry or execution.

12. This action is retained to confirm the Commissioner's sale, distribute the proceeds, adjudge any junior liens, and for the entry of such other orders or Judgment as may be necessary.

(s) Thomas L. Ballantine, Jr.

Judge

It is certified that this is a judgment concerning which the clerk is required to serve notice under CR 77.04. Notice of the entry of this judgment shall be served upon Mr. Ben Hardy, 209 S. 2nd Street, Louisville, Kentucky 40202, Alex F. Talbott, 900 Fiscal Court Building, Louisville 40202 and Charles I. Sandman, 100 N. 6th Street, Louisville, Kentucky.

(s) Alex F. Talbott
900 Fiscal Court
Louisville, Kentucky 40202

Entered on docket 10/24/77. Judgment Book #1, Page 80, 81 & 82.

Check, examined and approved.

(s) Edward L. Clark

APPENDIX C

ENTERED APRIL 20, 1978

NO. 180516 JEFFERSON CIRCUIT COURT

DIVISION THIRTEEN

JEFFERSON COUNTY, KENTUCKY PLAINTIFF

VS. ORDER

JOSEPH C. HOFGESANG SAND CO., INC., et al DEFENDANT

* * * *

This matter came before the Court on a motion of the defendant, Joseph C. Hofgesang Sand Co., Inc., filed on November 3, 1977, "for new trial, for amendment of judgment and to alter or amend or vacate the judgment and order of sale entered herein on October 24, 1977". This judgment was entered by former Judge, Honorable Thomas A. Ballantine, Jr.

While this Court recognizes its authority to vacate the judgment of a predecessor judge, it is believed that such action should be taken only with extreme caution.

After examination and consideration of the record,

IT IS ORDERED that the defendant's motion be and the same is hereby overruled.

(s) Lawrence E. Higgins

Judge

cc: Mr. Charles I. Sandman
Attorney for Plaintiff
100 North Sixth Street
Louisville, Kentucky 40202

Mr. Alex F. Talbott
Attorney for Cross-Claimant
900 Fiscal Court Building
Louisville, Kentucky 40202

Mr. Ben B. Hardy
Attorney for Defendant
400 Fireside Building
Louisville, Kentucky 40202

APPENDIX D

NO. 180516 JEFFERSON CIRCUIT COURT

THIRTEENTH DIVISION

JEFFERSON COUNTY, KENTUCKY PLAINTIFF

VS. ORDER

JOS. C. HOFGESANG SAND CO., INC. et al DEFENDANTS

* * * * *

This action coming on to be heard on Motion of Defendant, Jos. C. Hofgesang Sand Co., Inc., to stay the enforcement of the Judgment entered herein on October 24, 1977, pursuant to the provisions of CR 62.04, and the Court having heard arguments of all counsel herein; and

IT APPEARING that the Court is unable to determine any harm that would result to the Cross-Claimant, Louisville and Jefferson County Board of Zoning Adjustment; and

IT APPEARING that if the real estate which is the subject of the Judgment entered herein on October 24, 1977, were sold prior to a determination of the remaining claims in the action, such sale would result in harm to the Defendant, Jos. C.

Hofgesang Sand Co., Inc. as to the issues to be tried on such remaining claims; and

IT APPEARING that all money hereinafter required to be paid by the Plaintiff in this action as a result of the condemnation taking will be paid into Court and will be available for payment of the Judgment debt under the Judgment entered herein on October 24, 1977, and the Court being sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that enforcement of the Judgment entered herein on October 24, 1977, is hereby stayed pursuant to the provisions of CR 62.04, until final Judgment is entered in this proceeding on all remaining claims involved herein.

(s) Lawrence E. Higgins

Judge

Date entered: 5/4/78

Tendered by:

Ben B. Hardy
Counsel for Defendant, Hofgesang
Suite 400 Fireside Building
209 South Fifth Street
Louisville, Kentucky 40202
587-6621

APPENDIX E

NO. 180516 JEFFERSON CIRCUIT COURT

DIVISION 13

JEFFERSON COUNTY, KENTUCKY PLAINTIFF

VS NOTICE-MOTION- ORDER

JOSEPH C. HOFGESANG SAND CO., INC., et al. DEFENDANTS

TO: Mr. Charles Sandman
Attorney for Plaintiff
100 North Sixth Street
Louisville, Kentucky 40202

Mr. Ben Hardy
Attorney for Defendants
400 Fireside Building
Louisville, Kentucky 40202

Mr. Alex Talbott
Attorney for Louisville and Jefferson
County Planning Commission
900 Fiscal Court Building
Louisville,Kentucky 40202

* * * * * * *

Please take notice that the undersigned will, on Thursday, May 17, 1979, at the hour of 2:00 p.m. in the courtroom of the above Court, make the motion and tender the order set out below.

CERTIFICATE

It is certified that a copy of the foregoing was this 16th day of May 1979, delivered to the

persons and addresses listed above.

MOTION

The defendants, Joseph C. Hofgesang Sand Co., Inc., et al., moves the Court to enter the following order.

(s) Henry A. Triplett
Attorney for Defendants
231 S. Fifth Street
Third Floor
Louisville, Kentucky 40202
583-5581

ORDER

It appearing to the Court that this action was settled between the Hofgesang defendants and the plaintiff, Jefferson County, Kentucky, for $220,000 over and above the Commissioner's award, and the sum of money previously paid into Court and withdrawn by the Hofgesang defendants, and it appearing to the Court that the defendant, Louisville and Jefferson County Board of Adjustments and Appeals has a mortgage in the sum of $120,000 as surety on a bond executed by the Joseph C. Hofgesang Sand Company, Inc. to secure the performance of certain conditions

upon which the permit to operate a landfill was premised, and it further appearing that the mortgage includes property in excess of 50 acres which remains after the taking, and it further appearing to the Court that the deposition of R.J. Stewart gives an after value of $417,000 (pages 26 and 30), and it further appearing that Jefferson County, Kentucky's witness, Mr. Paul McDonogh, testified during the trial that the value of the remaining property was in excess of $200,000 and also stated this in his deposition (page 37), and the Court being aware that there is a serious question as to the amount of damages, if any, the Board of Adjustments and Appeals would be entitled to recover from Hofgesang, and being further of the opinion that the Louisville and Jefferson County Board of Adjustments and Appeals is adequately secured by a mortgage on the remaining property not taken, and being otherwise sufficiently advised, IT IS NOW ORDERED AND ADJUDGED:

(1) That so much of the mortgage lien on the

property taken is released and discharged.

(2) That the settlement between Jefferson County, Kentucky and Joseph C. Hofgesang Sand Company, Inc. for an additional $220,000 over and above the Commissioner's award and the amount paid into Court is approved and this settlement shall bear interest at the rate of 8% per annum until paid from May_____, 1979.

(3) The Joseph C. Hofgesang Sand Company, Inc. and the Joseph C. Hofgesang Foundation, Inc. shall execute the appropriate order of settlement. The cost of the condemnation portion of this action shall be borne by Jefferson County, Kentucky.

(s) Lawrence E. Higgins

Judge

Date : 5/17/79

OPINION RENDERED: March 23, 1979
TO BE PUBLISHED

APPENDEX F

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

78-CA-851-MR

JOS. C. HOFGESANG SAND COMPANY, INC. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LAURENCE E. HIGGINS, JUDGE
CIVIL ACTION NO. 180516

LOUISVILLE AND JEFFERSON COUNTY BOARD OF
ZONING ADJUSTMENT and JEFFERSON COUNTY, KENTUCKY APPELLEES

AFFIRMING IN PART and REVERSING IN PART

* * * * * * * * * * * *

BEFORE: HAYES, REYNOLDS, and WILHOIT, Judges.

WILHOIT, JUDGE. This is an appeal from a decision of the Jefferson Circuit Court holding appellant, Jos. C. Hofgesang Sand Company, Inc., liable for the entire value of a bond executed in favor of appellee Louisville and Jefferson County Board of Zoning Adjustment. The trial court, finding no genuine issues of fact, granted the board a summary judgement and Hofgesang appeals, citing numerous grounds of error.

The parties have been involved in extensive litigation. It appears from the record that in 1967

Hofgesang was granted a conditional use permit by the board to operate a borrow pit and sanitary landfill on about 60 acres of land owned by Hofgesang. As a condition to granting this permit, the board required Hofgesang to execute a bond in the amount of $120,000.00. This bond was secured by a mortgage on the tract.

The ordinance requiring execution of the bond called for a "performance bond." The stated conditions of the bond provided that if Hofgesang complied with applicable regulations and conditions the bond would be void. Until such compliance was achieved, however, the bond was to remain in full force and effect.

In 1973, Jefferson County condemned a small portion of the tract for purposes of constructing a floodwall. After the condemnation, representatives from the County Works Department and from the United States Corps of Engineers inspected Hofgesang's landfill. This inspection led to the filing of complaints concerning Hofgesang's operation of the borrow pit and landfill. Thereafter, the board revoked Hofgesang's conditional use permit upon a finding that Hofgesang had, in fact, violated several of the local regulations pertaining to sanitary landfills and borrow pits. The board further authorized its legal counsel to take action

to forfeit the bond executed by Hofgesang.

Hofgesang appealed to the Jefferson Circuit Court from the board's revocation of the conditional use permit. On October 1, 1975, the trial court affirmed the board's revocation, finding that Hofgesang had presented no substantial defense. The decision has not been appealed to this court.

On June 23, 1976, Jefferson County added the board as a party to its condemnation suite due to the lien claimed by the board under the mortgage bond The board responded by filing a cross-claim and motion for summary judgement against Hofgesang. The board sought to recover the entire $120,000.00 value of the mortgage bond and demanded sale of the property and a lien on any condemnation proceeds payable to Hofgesang by the county.

The county subsequently filed a supplemental complaint seeking to expand its taking. The commissioner's award for the extended taking was paid into court and Hofgesang withdrew the entire amount without objection.

On June 27, 1977, the board filed a motion for summary judgment seeking forfeiture of the mortgage bond. On August 10, 1977, the court entered an amended

Interlocutory Judgment pertaining to the extent of the county's taking. The board's summary judgment motion was also sustained, and the board's tenedered judgment was referred to the commissioner. On October 10, 1977, the commissioner recommended that the tendered judgment be signed.

Over Hofgesang's objections, the trial court signed the board's tendered summary judgment on October 24, 1977. Hofgesang then filed a motion under CR 59 which was overruled on April 20, 1978. Hofgesang now appeals from both orders.

The threshold question raised by the appellant is whether the board may constitutionally require the posting of a bond such as this, since there is no statutory authority permitting a bond requirement ordinance. The board, while contending it has the authority to require a bond, nevertheless argues that Hofgesang is estopped from raising the constitutionality of the ordinance.

We agree with the board. The rule in Kentucky is that " one who recognizes an ordinance and treats it as in force for a period of years may, under the

circumstances,be precluded from challenging its validity." Bowling Green-Warren County Airport Board v Long, Ky., 364 S.W. 2d 167, 179 (1962). As pointed out in Long, to reach such a result, it must appear that all the essential elements of estoppel are met. We believe those elements are present here. Further, Hofgesang has conceded on oral argument that the constitutionality of the ordinance is not its real challenge on appeal.

The next question we must consider is whether any genuine issue of material fact exists as to Hofgesang's breach of the bond conditions. Although Hofgesang admits that the earlier trial ruling on that issue is now res judicata, it goes on to assert the defense of impossibility of performance in its brief on appeal.

In our opinion, the summary judgment was correct insofar as it established that no genuine issues existed as to Hofgesang's breach of the bond conditions. All matters in regard to the breach itself have been previously litigated and may not now be raised. Hofgesang is barred from asserting any defence such as impossibility of performance or discrimination. However, the earlier, unappealed decision did not

involve in any way the extent of Hogesang's liability on the bond and cannot be said to have precluded the raising of this issue in the present case. Whittenberg Engineering & Construction Co. v. Liberty Mutal Insurance Co., Ky., 390 S.W. 2d 877, 883 (1965).

Hofgesang next contends that the trial court erred in granting summary judgment for the entire amount of the bond. According to Hofgesang, the extent of its liability may not be assessed until trial since genuine issues exist both as to the nature of the bond and the amount of damages actually sustained by the board. The board, on the other hand, contends that because the bond sets $120,000.00 as a "penal" sum, the bond is penal in nature and therefore the full amount of the bond is due once breach of any of its conditions is established.

Bonds calling for payment of the entire amount upon breach of conditions are sometimes termed "penal bonds" or, more frequently, liquidated damages bonds. Compare Black's Law Dictionary 1290 (rev. 4th ed. 1968) with 11 C.J.S. Bonds § 130 (1938). Apparently, some jurisdictions allow full and

automatic recovery upon proof of breach while others limit recovery to actual damages. To make matters more complex, the term "penal clause" may refer to a bond allowing collection only upon proof of damages, thus indicating that the bond is to provide compensation rather than punishment. Black's Law Dictionary 1290 (rev. 4th ed. 1968).

The most often accepted rule appears to be that the classification of a bond as one for compensation or penalty is dependent upon the intention of the parties. This intent may be ascertained from a variety of factors. For exampel, the annotation found at 103 A.L.R. 405, 408 (1936), discloses that:

> In the construction of such intent, the possibility or impossibility of ascertaining the actual damages, the character of the license or privilege granted to the principal of the bond, the character of the statute or ordiance for whose observance the bond is conditioned and provisions therein (or in the bond itself) as to liquidated damages," have all been important factors in influencing the decisions . . . . . .

Kentucky law also requires an evaluation of the parties' intentions before the extent of liability on a bond such as this may be assessed. American Book Co. v. Wells, 83 S.W. 622 (1904); Commonwealth v. Ginn, iii Ky. 110, 63 S.W. 467 (1901).

The Ginn case indicate that several factors must be established before the amount of liability may be assessed on bonds such as the one executed by Hofgesang. First, the parties' intentions must be evaluated. If it is found that the parties, or the statute and/or ordinance, intended the bond as a mere "penalty," the recovery is limited to actual damages. However, even if it is found that the bond was intended as liquidated damages, the court still must make some inquiry as to actual damage. Unless those damages are shown to be very difficult to establish, recovery is still limited to actual loss.

Applying these principles to this case, we are of the opinion that the court erred in granting summary judgment for the full amount of the bond.

While both the bond and the mortgage refer to a "penal" sum, that does not necessarily entitle the board to recover the entire amount as a matter of law. As stated earlier, the term "penal" has been assigned to both types of bonds. The fact that the ordinance uses the term "performance bond," rather than "penal bond," indicates that this bond was intended only to compensate the board for damages due to Hofgesang's breach of condition. In addition, there is no evidence showing that those damages are difficult to assess. Unless the board can establish that the ordinance allows for liquidated damages and the parties so intended, and that the damages in this case are difficult to assess, recovery on the bond is limited to the board's actual losses due to Hofgesang's breach. Consequently, many issues of material fact are yet to be determined.

Hofgesang further argues that the trial court erred in granting summary judgement and ordering sale of the entire tract. According to Hofgesang, the trial court's finding that the property is

indivisible was clearly erroneous. Since we have already held that the damages portion of the judgment must be remanded, it is unnecessary to evaluate this issue now. Should the trial court find, however, that the board's damages equal the entire value of the bond, a determination as to the necessity for selling the entire tract should be made at that time.

Hofgesang's final argument is that the county and the board represent the same legal entity and this renders the entire judgment procedurally incorrect. Because this argument was not presented to the trial court it cannot be raised on appeal. Akers v. Floyd County Fiscal Court, Ky., 556 S.W. 2d 146 (1977).

For the reasons stated above, the decision of the Jefferson Circuit Court is reversed as to the damages issues and affirmed as to Hofgesang's liability on the bond. The judgment is remanded for further proceedings.

ALL CONCUR.

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APPENDIX G

OPINION RENDERED: June 13, 1980 ; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

78-CA-851-MR

JOSEPH C. HOFGESANG SAND COMPANY, INC. APPELLANT

ON REMAND FROM THE SUPREME COURT
NO. 79-SC-195-D

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LAWRENCE E. HIGGINS JUDGE
v. CIVIL ACTION NO. 180516

LOUISVILLE AND JEFFERSON COUNTY
BOARD OF ZONING ADJUSTMENT and APPELLEES
JEFFERSON COUNTY, KENTUCKY

REINSTATING PREVIOUS OPINION AND REMANDING

* * * * * * * * * * *

BEFORE: HAYES, Chief Judge, REYNOLDS, and WILHOIT, Judges.

WILHOIT, JUDGE. This case is before us on remand from the Kentucky Supreme Court to reconsider our previous opinion in light of City of Paducah v. Jones, 126 Ky. 809, 104 S.W. 971 (1907), and

American Book Co. v. Wells, 26 Ky. L. Rep. 1159, 83 S.W. 622 (1904). In obedience to the order of the Supreme Court we have done so. We do not believe that these two cases require a different result from that reached by us in our previous opinion.

In City of Paducah v. Jones, supra, the Court was confronted with an ordinance which specifically set the amount of the bond in question at $1,000.00. The ordinance made no privision for any lesser amount, and the Court remarked that "[i]t is not contemplated that the recovery should be for any less sum than that fixed." 104 S.W. at 975. In American Book Co. v. Wells, supra, the Court was confronted with a statute which set the amount of the bond in question at $10,000.00, while the bond itself provided that upon breach the full amount of the bond would be paid as "liguidated damages." In considering the argument of the principal that the entire amount of the bond should not be recovered because the penalty would be disproportionate to the actual damage for breach of the conditions of the bond, the Court observed:

> We have re-exmanined the question, but remain satisfied with the conclusion reached in Commonwealth v. Ginn, supra. In addition to the reasons given in that opinion, we will add that the penalty imposed on the obligors by this bond is one fixed by statute. Consequently, it is the law that allows its recovery and not merely the agreement of the parties, as is the case where the courts sometimes relieve the one in default upon a contract because it is a hard bargain and against conscience to enforce it. But a statutory penalty is never void or unenforceable because in the opinion of the court it is harsh. That is a matter solely for the legislative discretion, to correct which is wholly beyond the power of the judiciary. Clark v. Barnard, 108 U.S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780.

83 S.W. at 626.

In Commonwealth v. Ginn, 111 Ky. 110, 63 S.W. 467 (1901), cited in the above quotation and by us in our previous opinion, the Court permitted recovery of the full amount of a $10,000.00 statutory bond, identical to that in Wells, noting:

> The true rule may be stated to be, where the damages resulting from the breach of an agreement would be very uncertain, and evidence of their amount very difficult to obtain, and the fair import of the agreement is that the amount of money in it is specified and agreed on to save

> expense and avoid the difficulty of proving an actual damage, and is not out of proportion to the actual cash damages, it will be regarded as liquidated damages.

63 S.W. at 470 (emphasis added).

In Ginn, the Court also stated that the general rule as to construction of a bond is to determine the intention of the parties at the time of the agreement as to whether the sum named in the bond to be paid upon its breach is liquidated damages or merely a penalty. The Court construed the statute there to require that the full sum of the bond be recovered in the event of a breach as the terms of the bond also provided.

In the case before us no statute fixed the amount of the bond or required recovery of its full amount upon breach of any of its conditions. In fact the amount of the bond was arrived at through negotiation between the parties. The zoning regulations require a bond of $2,500.00 per acre, secured by a deposit of cash, a certified check, or corporate surety. The bond

given by the appelant was for $2,000.00 per acre and was secured by a mortgage on the land itself. Neither the bond nor the mortgage given to secure it provide that the amount of the bond is to be forfeited as liquidated damages upon breach. There is nothing in the zoning regulations making such a requirement. There is no evidence in the record from which we can determine if the actual damage caused by the breach is proportionate to the amount of the bond, particularly if, as contended by the appellant, the sole purpose of the bond was to insure only that actual digging itself and refilling were completed in accordance with the ordinance.

We hereby reinstate our previous opinion in this matter and remand the case to the trial court for further proceedings consistent with that opinion.

ALL CONCUR.

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APPENDIX H

RENDERED: May 26, 1981

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

80-SC-437-D

LOUISVILLE AND JEFFERSON COUNTY BOARD OF ZONING ADJUSTMENT — MOVANT

V. ON REVIEW FROM COURT OF APPEALS
78-CA-851-MR
(Jefferson Circuit Court 180516
HONORABLE LAURENCE E. HIGGINS, Judge)

JOSEPH C. HOFGESANG SAND COMPANY, INC. — RESPONDENT

OPINION OF THE COURT BY JUSTICE STEPHENS

REVERSING

This case involves the forfeiture of a bond given by Joseph C. Hofgesang Sand Company, Inc., (hereinafter Hofgesang) to the Louisville and Jefferson County Board of Zoning Adjustment, (hereinafter Board). The principal issue on appeal is whether the sum of $120,000 stipulated in the bond is recoverable in its full amount, or whether the

Planning and Zoning Commission is entitled only to its actual damages.

The execution of the bond by Hofgesang, in 1967, was one of several conditions imposed by the Board for the issuance of a conditional-use permit to Hofgesang for the operation of sanitary landfill in Jefferson County. The zoning regulation which authorized the bond provided that it would be a guarantee of the principal's strict compliance with the conditions and requirements set forth in the zoning regulations relating to the operation of landfills. A real estate mortgage on the property owned by Hofgesang secured the bond. Both the bond and mortgage contained similar language, declaring that Hofgesang would comply with all the conditions and regulations and was firmly bound in the penal sum of $120,000, and that the penal bond in the sum of $120,000 secured the faithful performance of the regulations and conditions.

In 1973, the conditional-use permit was revoked pursuant to KRS 100.237(4), after it was discovered that Hofgesang was receiving and dumping

toxic waste into the landfill and was engaging in other hazardous activities prohibited by local regulations and hence by the conditions upon which the permit was granted. Shortly after the revocation was upheld on appeal, the Board, as holder of a mortgage on the landfill tract, was added as a party to a condemnation suit against Hofgesang, instituted by Jefferson County, which hoped to build a floodwall on a portion of the tract. The Board immediately cross-claimed against Hofgesang and filed a motion for summary judgment seeking forfeiture of the entire amount of the mortgage bond. On October 24, 1977, this motion for summary judgment was granted.

The Court of Appeals reversed and remanded the case back to the circuit court for the taking of more evidence. Although agreeing that the question of the breach of permit conditions was not in issue, the Court of Appeals thought that there still existed genuine issues on the nature and enforceability of the bond. The court interpreted the cases of American Book Co. v. Wells, Ky., 83 S.W. 622 (1904) and Commonwealth v. Ginn, Ky., 63 S.W.

467 (1901), to hold that Kentucky law requires an evaluation of the parties' intentions before the extent of the liability on the bond may be determined. The ccurt opined that if it was found that the parties intended a mere penalty, then the recovery of the non-defaulting party is limited to his actual damages. If the sum specified is meant as liquidated damages, then the full amount is recoverable only if it is reasonable and actual loss would be difficult to ascertain.

We believe that the Court of Appeals has misinterpreted the applicable law. As a general rule where a bond is given to a public body as a condition of a license or as a condition of compliance with the law, upon a breach, the full penalty of such bond may be recovered, in the absence of express or implied provisions to the contrary in the statute or ordinance that prescribes the bond, or in the bond itself. The rule holds regardless of the intent of the parties. United States v. Zerby, 271 U.S.332 (1926), City of Paducah v. Jones, Ky., 104 S.W. 971 (1907), American Book Co. v. Wells, supra, Common-

wealth v. Ginn, supra.

In the instant case, the bond executed by the parties describes the sum of $120,000 as a penal sum. According to the terms of the bond, the principal is obligated to pay the sum of $120,000, unless he complies with all the regulations and conditions of the conditional-use permit.

> "NOW, THEREFORE, the condition of this obligation is such that if the Principal shall perform said excavating and back-filling operation in accordance with the conditions of said application and approval then this obligation shall be null and void; otherwise to remain in full force and effect."

The mortgage, which secures the bond, reiterates the same terms and conditions. The purpose of the mortgage is set forth in the instrument, as follows:

> "1. That the mortgagor has this day executed a penal bond to the mortgagee in the sum of $120,000 to secure its faithful performance of all regulations and conditions set forth in the application and approval thereof for conditionsl use to permit an excavation and provide a landfill area for an industrial and sanitary dump on the above described property bearing Docket No. B-30-67 of the Board of Zoning Adjustment."

The zoning ordinance, Sec. 30, entitled "Conditional Uses," pursuant to which the bond was required supports this interpretation. The provision relating to the bond reads as follows:

> "5. GUARANTEE:
>
> To insure the strict compliance with all the above conditions and requirements, the applicant shall deposit with the Board cash or a certified check, or execute a bond with a corporate surety authorized to do a surety business in Kentucky. The amount of the cash, certified check, or bond shall be listed below for each acre, or portion thereof, of the site where the excavation or filling operation is located."

It must be presumed that the parties understood the terms of the agreement clearly set forth in the instruments of that agreement.

In deference to the opinion of the Court of Appeals, we note that the decision in Commonwealth v. Ginn, supra, does make mention that the determination of whether damages are liquidated depends on the intent of the parties and the ability to ascertain actual damages. But the true import

of the opinion was clarified in the later cases of Jones, supra, and Wells, supra. In Jones it was states:

> "The bond executed by a licensee is nothing more than security that he will obey the law. The sureties in the bond bind themselves that he will do this. It is on their on part a contract obligation; and , if the bond is broken, as between them and the licensing authoritities, they are liable for the sum stipulated in it. The question of the amount of damages caused by the violation of the law by the principal does not and cannot, enter into the question. It is not contemplated that the recovery shold be lfor any less sum than that fixed. It would be totally impracticable if not impossible in an action by the city on the bond to arrive at any measure of damage, except the amount stipulated. In an action upon a bond properly executed, the only legitimate subject of inquiry is whether or not the sureties by the letter of their undertaking agree that they will pay a certain sum . . ."

Id. at 975

In the present action it would be a practical impossibility for the Board to prove its damages. But the purpose of the $120,000 sum is not really to pay damages. It is a penalty imposed upon those

who breach the conditions of their permit. Hofgesang has no automatic right to operate a sanitary landfill. It is a privilege conferred upon them by the Board. The Board, as grantor of the permit, has the right to determine the conditions of the privilege and the $120,000 penal sum is insurance that these conditions will be met.

When Hofgesang breached the condition of the bond, it forfeited the $120,000.

The decision of the Court of Appeals is reversed and the summary judgment granted by the Circuit Court is affirmed.

All concur, except Sternberg, J., who dissents.

ATTORNEYS FOR MOVANT:

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ATTORNEY FOR RESPONDENT:

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APPENDIX I

ENTERED July 7, 1981

SUPREME COURT OF KENTUCKY

80-SC-437-DG

LOUISVILLE AND JEFFERSON COUNTY BOARD OF ZOING ADJUSTMENT — MOVANT

V. ON REVIEW FROM THE COURT OF APPEALS
78-CA-851-MR
(Jefferson Circuit Court NO. 180516)

JOSEPH C. HOFGESANG SAND COMPANY, INC. — RESPONDENT

ORDER DENYING PETITION FOR REHEARING

Respondent's petition for rehearing is denied.

All concur.

ENTERED July 7, 1981.

(s) John Palmore

Chief Justice

APPENDIX J

June 15, 1977

I, Paula K. Zipp, certify that I am the duly appointed Secretary of the Louisville and Jefferson County Planning Commission and that the attached is a true and correct copy of a portion of Section 30 of the Zoning District Regulations for Louisville and Jefferson County as said regulations appear in the records on file in the Planning Commission office.

(s) Paula K. Zipp
Secretary

LOUISVILLE AND JEFFERSON COUNTY
PLANNING COMMISSION

SECTION 30

CONDITIONAL USES

Certain land uses due to their extent, nature of operation, limited application, or relationship to natural resources must be considered as exceptional cases. The uses listed in this section may be permitted in certain districts, by Conditional Use Permit, following a public hearing before the Louisville and Jefferson County Board of Zoning Adjustment provided such uses will not have an adverse effect on neighboring property, are not in conflict with elements and objectives of the Master Plan and will not adversely affect the public health, safety, morals, and the general welfare.

A request for a Conditionsl Use Permit shall be accompanied by a plan, prepared by a professional engineer regisitered in Kentucky, showing the boundaries of the site and the present and proposed use of land, the arrangement of all buildings and structures, the location of roads, parking area, loading spaces, utility lines, sanitary facilities, grading, drainage, landscaping, and other pertinent features. In addition, the following data shall be filed with the Board, by inclusion on the plan or in a prepared statement, before the date of the public hearing is set:

Name of owner or developer

Location with reference to major streets and highway

Topographical characteristics of site and surrounding area within 50 feet.

Present development of site and surrounding property

Reasons for locating proposed use of the specific location

Community or neighborhood need for proposed

Benefits to inure to community or neighborhood

Description of arrangement or operation of proposed use

Provisions for, and guarantees to assure, the protection of the public health, safety, morals, general welfare, surrounding property and neighborhood values.

Permits or controls, or copies thereof, required by all public agencies concerned with the operation, shall be filed with the application.

Tenure of the operation and, if of a temporary nature, a plan for disposal of facilities and restoration of site upon termination or abandoment of use.

STANDARDS FOR THE RELEASE OF PERFORMANCE BONDS POSTED ON CONDITIONAL USES

Before the Board shall release any bond or other assurances given by the applicant for a conditional use permit as provided in this section, the applicant shall file with the Board the following:

1. Sworn statement of the holder of the conditional use permit that all the requirements, conditions and assurances which were included in the application have been met.

2. If the approval of a conditional permit included or referred to any surveys, drawing, plans or specifications which showed the existing, proposed and ultimate development of the conditional use, the applicant shall file with the Board a written opinion, certififed by a professional engineer registered in Kentucky, that all work, improvements and developments have been constructed or installed in conformity with the plans filed with the conditional use application. Copies of this information shall be forwarded to the respective Directors of Works within whose jurisdictions the work is located, for their review and recommendation to the Board.

In the case of a conditional use permit allowing excavation and filling operations, there shall be filed with the Board (with a copy forwarded

to the respective Directors of Works) a survey, certified by a professional engineer registered in Kentucky, showing the funished surface and indications showing the layer of clean earth which was installed and compacted over the fill when the surface was brought to finished grade. The indications shall be based on test hole borings taken no farther than 100 feet apart, starting no more than 5 feet inside and along the edges or boundaries of the fill.

3. A letter of recommendation to the Board from the respective Directors of Works that all work, improvements or developments are in conformity with their respective requirements, including a statement that he has reviewed the opinion of the engineer.

A. The following uses may be allowed in any district upon the granting of a Conditional Use Permit and compliance with the listed requirements:

D. The following uses may be allowed in the R-1, M-2 and M-3 Districts upon the granting of a Conditional Use Permit and compliance with the listed requirements:

Commercial Hog Feeding Yards:

1. All buildings, structure, pens, and yards shall be at least 100 feet from all property lines.
2. Adequate water supply shall be available to maintain the premises in a sanitary condition.

Excavation and Filling Operations:

Any operation which involves a change in the existing ground surface (except grading and shaping of the land around a building structure or use) shall be subject to the following regulations:

1. Uses Included (or any combination thereof)
   a. Extraction and development of earth products, minerals and other natural resources, including sand and gravel pits and quarries.
   b. Borrow pits and earth excavations.

c. Dumps and land-fills for non-combustible materials.

d. Incinerators, public and private.

e. Sanitary land-fills.

2. a. Drawings:

A plan drawn at a scale of not less than 100' to the inch showing the following:

(1) The exact boundaries of the site and access to public ways.

(2) Present and proposed use of land, the arrangement fully dimensioned of all existing & proposed buildings, structures, roads, drives, parking areas, loading spaces, water, sewer, power and other utility lines, sanitary facilities, surface drainage, landscaping, fencing and all other features and facilities to be installed or used in connection with the proposed operation.

(3) Show by contours of not less than 2 foot intervals (except on extremely steep slopes):

(a) The present surface of the site and the surrounding properties within 50 feet from its boundaries by the use of dashed contours.

(b) The ultimate depth elevations of the area to be excavated or filled by the use of dot and dash countours.

(c) The ultimate finished surface of the site after all excavation and filling operations are completed by the use of solid line contours.

(4) Cross sections at critical points to illustrate the methods to be employed in the process of excavating and fill.

(5) Locations where excavation and filling operations will commence and the procedural sequence of operations.

(6) Methods to be employed for surface drainage during and after completion of operations.

(7) The volumes of materials to be excavated and filled for each location on the site where

operations are to take place.

(8) Improvements, each as new roads and pavements to be installed off the site to enable the operation to be carried out.

(9) The plan shall show the names and addresses of the owners of the site and all adjoining properties, the name and address of the engineer who prepared the plan, scale, northpoint, the geographical relationship of the site to existing public ways and major streets and highways.

3. General Standards:

a. No excavation shall be made within 50 feet of any boundary of the site.

b. Side slopes of excavation and fills in earth, sand or gravel shall not exceed one (1) foot vertical to two (2) feet horizontal and shall be blended into undisturbed existing surfaces.

c. A chain link woven wire fence six feet high with 3 strands of barbed wire over the top

shall be installed along the boundaries of excavated areas and provided with gates of the same construction as the fence which shall remain locked at all times when active operations are not taking place and shall be properly maintained until all operations are completed.

d. Provisions shall be made for the disposal of surface water falling on or crossing the site at all times, during and after completion of the operations. The operations shall not obstruct the normal flow of any public drain, or abrogate the riparian rights of any other party to a stream or drain.

e. The depth of excavation and the materials to be used for fill shall not have any adverse effect on the supply, quality or purity of ground water or wells. In no case shall an excavation be carried to a depth below an elevation of 410 feet above mean sea level.

f. A layer of clean earth at least two (2) feet thick shall be deposited and thoroughly compacted over all fill to bring the surface to the

finished surface grade as shown on the topographic plan filed with the application.

g. The finished surface of the site shall bear the proper relationship to that of adjoining properties.

h. The installation of roads, parking areas, buildings, structures and operational facilities and equipment shall be located on the site so that adjoining properties will not be adversely affected.

i. Excavation and fill materials shall be moved off and onto the site in vehicles approved by the City of Louisville and Jefferson County.

j. All Filling operations shall be in strict conformity with the regulations of the Louisville and Jefferson County Board of Health, Air Pollution Commission, and the Kentucky Water Pollution Commission. Letters or certificates of approval of the plans by the above agencies or other public agencies, shall be filed with the application.

k. The operation shall be conducted so as not to

create a nuisance or cause undue noise, vibration, dust, odor or candescence to adjacent properties. The premises shall be kept in a neat and clean condition at all times. No loose paper or debris shall be allowed on the site except on areas where active filling operations are taking place. Dusty conditions shall be corrected by sprinkling with water or by use of calcium chloride or some other approved method. No fires shall be permitted. Any smoldering flame or spontaneous combustion shall be immediately extinguished.

l. In no event will the premises be used for salvage operations of any kind. No separation, or picking of waste materials will be permitted. All unacceptable fill materials as noted elsewhere in this section shall be removed from the premises immediately after delivery.

m. Except for protective fences, no building or structure erected in connection with the operation shall be located in any required yard

or closer than 30 feet from any property line.

4. Standards for Specific Operations:

a. In addition to the general standards listed above, the following additional standards shall apply to:

1. Dumps and land-fills for non-combustible materials

(a) Fill material shall be limited to inorganic materials and other substances not subject to decomposition, combustion or the prodcution of odors.

(b) Materials shall be spread and thoroughly compacted as they are deposited.

2. Incinerators, public and private

(a) No incinerator building or structure shall be located closer than 200 feet from any site boundary line, and no other building or structure used in connection with the operation

shall be located closer than 30 feet from any site boundary line. Access to the incinerator shall be located so as to require a minimum of travel on a public way.

(b) The entire site shall be enclosed with fencing and gates as required in Section 3c above.

(c) All materials delivered to the site which are organic or of organic origin or other combustible materials such as paper, carboard, rubber, plastic, wood fiber, sawdust, floor sweepings, plaster board, framing, lumber, laths, tree stumps, trunks, branches, foliage, furniture, rags, garbage and industrial wastes and including metal and glass containers shall be burned in the incinerator.

(d) All residue resulting from the burning operations and other fill materials which are inorganic or substances which are not subject to decomposition combustion or the production of odors shall be spread and thoroughly compacted as they are deposited.

(e) All materials which are to be burned shall be placed on or in a concrete slab or hopper enclosed by a building, masonry walls or chain link type fencing at least 6 feet high provided with doors or gates which shall be securely locked when the incinerator is not in operation. The materials shall be transferred from the slab or hopper into the incinerator as soon as they are received but in any case all combustible materials shall be burned during the same day that they were delivered. The slab or hopper shall be kept clear of all materials when not in active use.

(f) There shall be no separation or picking of materials or storage for the salvage thereof on the site.

(g) All deliveries of materials to the site, loading of the incinerator, filling, spreading, comacting and grading shall be done between the hours of 7:00 A.M. and

5:00 P.M. on weekdays only.

(h) A watchman shall be stationed at the site at all times for whom a suitable shelter or living quarters shall be provided.

(i) Sanitary toilet facilities shall be provided on the site in accordance with the requirements of the Department of Health.

3. Sanitary Land Fills and Dumps

(a) No building or structure, except fencing, used in connection with the operation shall be located closer than 30 feet from any site boundary line.

(b) Access to the site shall be located so as to require a minimum of travel on a public way.

(c) The entire site shall be enclosed with fencing and gates as required in Section 3c above.

(d) All materials delivered to the site which are organic or of organic origin and all paper, cardboard, plastic, metal and glass containers, wood fiber, sawdust, floor sweepings, plaster board, framing lumber, laths, tree stumps, trunks, branches, foliage, furniture, rags,

grabage and industrial waste shall be deposited and thouroughly compacted in layers not exceeding six (6) feet in depth. Rubber tires, dead animals, and by product wastes of a gaseous liquod, or semi-liquid nature such as far, paints, solvents, sludge, rubber and plastics and other flame or fume producers shall not be permitted as fill material. Each day's deposit, after compaction, shall be covered with a layer of earth at least six (6) inches in thickness after compaction. The face of the fill as well as the horizontal surface shall be covered with a layer of earth to prevent any movement of fill by wind or water erosion.

(e) There shall be no separation or picking of materials or storage for the salvage thereof on the site. All unacceptable fill materials as noted in paragraph (d) above shall be removed from the premises immediately after delivery.

(f) Water lines shall be installed, connected to a public water supply, or to some other source, which by use of pumps, will provide water in

sufficient quantity to combat fires or settle dust.

(g) Sanitary toilet facilities shall be installed in accordance with the requirements of the Department of Health.

(h) No fires shall be permitted. Any smoldering flame or spontaneous combustion in the fill shall be immediately extinguished.

(i) A watchman shall be stationed at the site at all times for whom a suitable shelter or living quarters and sanitary facilities shall be provided on the site.

(j) The premises shall be kept neat and clean at all times, no loose paper or debris shall be allowed on the site except on areas where active filling oprations are taking place. Dusty conditions shall be corrected by sprinkling with water or by the use of calcium chloride or other approved method.

(k) All deliveries of materials to the site, filling, spreading, compacting and grading

shall be done between the hours of 7:00 A.M. and 5:00 P.M. on weekdays only.

(l) Filling operations shall begin immediately upon the issuance of a permit therefor. All areas shall be re-filled to finish grades as shown on the topographic map filed with the application within a period of five (5) years after commencement of operations. The Board may extend such time limit after a public hearing, but in any event all excavations on the site shall be refilled to finish grade within ten (10) years after commencement of operations.

4. Borrow Pits and Earth Excavations:

(a) No building or structure, except fencing, used in connection with the operation shall be located closer than 30 feet from any site boundary line.

(b) Access to excavations shall be located so as to require a minimum of travel on a public way.

(c) Areas where excavations have been made and are taking place shall be enclosed with fencing as required in Section 3c above.

(d) Sanitary toilet facilities shall be installed in accordance with the requirements of the Department of Health.

(e) A watchman shall be stationed at the site at all times when active operations are taking place for whom a suitable shelter or living quarters and sanitary facilities shall be provided on the site.

(f) Re-filling operations as required shall begin immediately on areas when excavations have been made to the ultimate depth and such areas shall be re-filled to finish grades as shown on the topographic map filed with the application within a period of five (5) years after commencement of excavation operations. The Board may extend such time limit after a hearing, but in any event all excavations on the site shall be refilled to finish

grade within ten (10) years after commencement of operations.

5. GUARANTEE:

To insure the strict compliance with all of the above conditions and requirements, the applicant shall deposit with the Board cash or a certified check, or execute a bond with a corporate surety authorized to do a surety business in Kentucky. The amount of cash, certified check, or bond shall be fixed at the rates as listed below for each acre, or portion thereof, of the site where the excavation or filling operation is located.

a. Extraction and development of earth products minerals and other natural resources ------ $1000.00 per acre

b. Borrown pits and earth excavations — $1000.00 per acre

c. Dumps and land fills for non-combustible materials ------ $1000.00 per acre

d. Incinerators, public and private — $2500.00 per acre

e. Lake and lagoons ---- $1000.00 per acre

f. Sanitary land fills -------
$25000.00 per acre

If there is a combination of any of the above operations. the larger amount shall apply.